107-258

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 87.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, ADMINISTRATOR, &C., OF HORATIO AMES, DECEASED, PLAINTIFF IN ERROR,

vs.

DAVID WALKER.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 11, 1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 87.

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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istrator c. t. a. d. b. n. of the estate of Horatio Ames, deceased, on or before the 8th day of February, 1876, the sum of thirty-four thousand eight hundred and seventy-six $\frac{75}{100}$ dollars ($34,876.75); but she has not paid over the same nor any part thereof, nor have the defendants done so, nor either of them. On the 29th day of February, 1876, said Nathaniel Wilson, as such administrator, brought suit against the said Charlotte L. Ames in the supreme court of the District of Columbia, said suit being No. 15472 on the law docket of said court, and on the same day a summons issued out of said court, addressed to said Charlotte L. Ames, which said summons was returned *non est inventus* by the marshal of said district, on the 8th day of March 1876. Said Charlotte L. Ames is not a resident of the District of Columbia, and is wholly insolvent.

And the plaintiff claims thirty-four thousand eight hundred and seventy-six $\frac{75}{100}$ dollars ($34,876.75), with interest thereon from the 9th day of February, 1876.

STANTON & WORTHINGTON,
Att'ys for Pl't'ff.

The defendants are to plead hereto on or before the first special term of the court, occurring twenty days after service hereof.

Otherwise judgment.

STANTON & WORTHINGTON,
Att'ys for Pl't'ff.

I, Nathaniel Wilson, on oath, say that the facts stated in the foregoing declaration are true to the best of my knowledge and belief, and that the amount therein claimed—$34,876.75—is due from the defendants to the plaintiff, exclusive of all set-offs and just grounds of defense.

NATH'L WILSON.

Sworn and subscribed to before me this 12th day of April, 1876.

[SEAL.] J. C. HEALD,
Notary Public.

Filed April 12, 1876.

Demurrer to declaration.

In the supreme court of the District of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL Wilson, administrator, &c., *v.* CHARLOTTE L. AMES ET AL. } No. 15679. At law.

3 The defendants Eunice B. Sawyer and David Walker say that the declaration is bad in substance.

GEO. W. PASCHAL,
Att'y for Sawyer and Walker.

And one of the points intended to be argued as a matter of law is that the administrator de bonis non has no right to recover against the first administrators and their securities for a devastavit by such administrators.

GEO. W. PASCHAL, *Att'y.*

And the said defendants Eunice B. Sawyer and David Walker being sworn, say that this demurrer is not filed for delay.

EUNICE B. SAWYER.
DAVID WALKER.

DISTRICT OF COLUMBIA,
County of Washington:

Sworn to and subscribed before me this 10th day of May, A. D. 1876.

S. W. RITTENHOUSE,
Notary Public.

I, George W. Paschal, att'y for the above-named defendants, certify that the demurrer, in my opinion, has merits.

Filed May 16, 1876.

Joinder in demurrer.

In the supreme court of the Dist. of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL Wilson, administrator, &c., *v.* CHARLOTTE L. AMES ET AL. } No. 15679. At law.

The plaintiff says that the declaration is good in substance.

STANTON & WORTHINGTON,
Att'ys for Pl'ff's.

Filed May 17, 1876.

4 *Order overruling demurrer.*

In the supreme court of the Dist. of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL Wilson, administrator, &c., *v.* CHARLOTTE L. AMES, ET AL. } No. 15679. At law.

Upon argument of the defendants' demurrer to the plaintiff's declaration, it is considered that said demurrer be, and the same is, overruled, and leave granted the defendants to plead over.

March 15, 1879.

Pleas.

In the supreme court of the District of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL Wilson, administrator, &c., *v.* CHARLOTTE L. AMES ET AL. } No. 15679. At law.

The defendant David Walker, for plea to the first count says: That

the said bond was given to the United States, and was subject to a certain condition thereunder written, that if Cunningham Hazlett and Charlotte L. Ames should well and truly perform the office of administrators of Horatio Ames, deceased, and should discharge the duties of them required by law as such administrators, without any injury to any person interested in the faithful performance of the said office, then the said bond should be void; and the defendant says that the said Cunningham Hazlett and Charlotte L. Ames well and faithfully observed, performed, and fulfilled the matters and things in the said condition mentioned and contained. And this he is ready to verify.

And for plea to the second count, says:

(1.) That by the said condition of the bond this defendant, as surety, became liable to the plaintiff, as administrator de bonis non, only for such of the assets of the said estate as had not been converted into money by the said administrators or the survivor; and the defendant says that the assets of the said estate consisted wholly of a claim or chose in action owing by the Government of the United States, and that the money claimed in this action is the proceeds of said claim or chose in action collected from the said government and thereby converted into money by the said surviving administrator, to wit, on the 11th of April, 1871, and the 6th of January, 1873; and this defendant says he ought not to be precluded by the said order of court from showing that the money claimed in this action is the proceeds of said claim or chose in action converted into money as aforesaid, because he says that he was not a party to the proceeding in which said order was passed, nor was he served with process in said proceeding, nor did he voluntarily appear therein, nor had he any notice or knowledge of the pendency thereof. And this the defendant is ready to verify

And for a further plea to said count, the defendant says:

(2.) That by the said condition of the bond this defendant, as surety, became liable to the plaintiff, as admistrator de bonis non, only for such of the assets of the estate as had not been administered by the said administrators or the survivor; and the defendant says that the money claimed in this action is for assets and estate which had been administered before the removal of the said surviving administrator from office and the appointment of the plaintiff; and this defendant says that he ought not to be precluded by the said order of court from showing that the money claimed in this action is for assets and estate so administered, because he says that he was not a party to the proceeding in which said order was passed, nor was he served with process in said proceeding, nor did he voluntarily appear therein, nor had he any notice or knowledge of the pendency thereof. And this the defendant is ready to verify.

W. D. DAVIDGE,
Att'y for Def't.

DISTRICT OF COLUMBIA, *to wit:*

I, David Walker, a defendant in the above-entitled cause, deny the right of the plaintiff to recover any part of the claim set up therein. I am surety upon the administration bond mentioned in the pleadings, and became such without any consideration and solely as an act of kindness, and I am informed and believe that the assets of the estate to which said bond

relates consisted exclusively of a claim against the United States Government, which claim was collected and duly administered by the surviving administrator, Charlotte L. Ames, before her removal, and the appointment of the plaintiff as administrator de bonis non. I further say that I was not a party to the alleged proceeding wherein the order of court was passed, nor was I served with process therein, nor did I voluntarily appear, nor had I any notice or knowledge of the pendency thereof.

DAVID WALKER.

Sworn to and subscribed before me this 6th day of May, 1879.

W. E. HOWARD, [SEAL.]
Notary Public.

Filed May 6, 1879.

Replication to first plea and demurrer to second and third.

In the supreme court of the District of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator, &c.,
v.
CHARLOTTE L. AMES ET AL. } No. 15679. At law.

6 The plaintiff, for replication to the first plea of the defendant David Walker, says that it ought not to be precluded from having and maintaining its action aforesaid against the said David Walker by anything alleged by the said defendant in his first plea, because it says that the said Charlotte L. Ames did not well and truly perform the office of administratrix of Horatio Ames according to the true intent and meaning of the condition of the said writing obligatory, but violated her duty as such administratrix, and broke the condition of the said writing obligatory in the following instances, that is to say:

1st. That at divers times between the 1st day of April, 1871, and the 1st day of February, 1873, said Charlotte L. Ames, as administratrix as aforesaid, collected from the United States of America a large sum of money, to wit, $39,955, which sum, after collection, she allowed to remain in the hands of one Clifford Arrick, her attorney and agent, till and after the 9th day of January, 1875, on which day, by an order made by a justice of this court holding a special term thereof for probate business, after due notice to her, she was removed from her said office, and, by the same order, Nathaniel Wilson was appointed administrator of the estate of said Horatio Ames in her place, and she was directed to forthwith pay and transfer to said Nathaniel Wilson all moneys and assets belonging to said estate held by her or by her agents and attorneys; yet she did not pay or transfer to said Wilson said sum of money so held by said Arrick, or any part thereof, and said Wilson has never received said sum or any part thereof. And this the plaintiff is ready to verify.

2d. That on the 22d day of January, 1876, in the final settlement of her account as administratrix as aforesaid by said court, she was charged with the sum of $34,876.75 above all allowances, and by a decree of said court of that date she was directed to pay over said sum to said Wilson, administrator as aforesaid, on or before the 8th day of February, 1876;

yet she has not paid the same or any part thereof, and said Wilson has not received said sum, nor any part thereof. And this the plaintiff is ready to verify.

3d. That after the death of said Cunningham Hazlett, to wit, on the 4th day of June, 1873, said Charlotte L. Ames filed in this court her account as administratrix as aforesaid, in which account she stated that she had collected $39,955 from the United States, and claimed certain allowances and credits amounting to $36,304.58, and charged herself with the difference between said sums, to wit, $3,650.42, as a balance for distribution; and afterwards, to wit, on the 22d day of January, 1876, in the final settlement of her account as administratrix as aforesaid, by a decree made by a justice of this court holding a special term thereof for the transaction of probate business, she was directed to pay over said sum so held by her for distribution to said Wilson, administrator as aforesaid, on or before the 8th day of February, 1876; yet she has not paid the same or any part thereof, and said Wilson has not received said sum, nor any part thereof. And this the plaintiff is ready to verify.

And the plaintiff says that the second and third pleas of the defendant David Walker are bad in substance.

NOTE.—The matters of law upon which this demurrer is founded are these—

1. The pleas state matters of law.

2. The said order of said court is binding upon the said Charlotte L. Ames, and is therefore binding upon the sureties on her administration bond, whether they had notice or were made parties or not.

7 3. Sections 974–5–6, Revised Statutes, District of Columbia, authorize the justice holding the probate court to remove an administrator, to appoint a new one, and to direct the former administrator to pay over to the administrator de bonis non all unadministered assets. The said order or decree of the probate court was made under that statute, and in this proceeding the court will presume that the justice holding the probate court, who made said order or decree, had before him sufficient evidence to warrant said order. If he erred the only remedy was by appeal.

WORTHINGTON & HEALD,
Attorneys for plaintiff.

Filed May 16, 1879.

Demurrer to replication and joinder in demurrer to pleas.

In the supreme court of the District of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator, &c.,
v.
CHARLOTTE L. AMES ET AL. } No. 15679. At law.

And now comes the said defendant David Walker and says that the said replication of the plaintiff to the first plea of the defendant and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the plaintiff to have and maintain his aforesaid action, and that the defendant is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want

of a sufficient replication he prays judgment if the plaintiff ought to have or maintain his aforesaid action.

And the said defendant states and shows to the court here the following causes of demurrer to the said replication:

1. The replication on its face shows the fund was administered assets. No right of suit in the plaintiff is averred.

2. The decree of a court of special and limited jurisdiction is not sufficiently set forth. The jurisdiction of the probate court is not averred, nor the nature of the proceedings nor parties thereto. As averred, the decree was void.

3. It is not averred that the court in probate undertook to decide what were administered assets.

4. Compliance with the act of 1720, chapter 24, is not averred.

5. Misjoinder. The bond is the same as set forth in the second, third, and fourth counts of declaration.

6. No demand, and because the said replication is in other respects uncertain, informal, and insufficient.

And to the demurrer of the plaintiff to the second and third pleas of the defendant he says that the said pleas, and each of them, are good in substance.

W. D. DAVIDGE,
Att'y for def't.

Filed May 26, 1879.

8 *Joinder in demurrer to replication.*

In the supreme court of the Dist. of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator, &c.,
v.
CHARLOTTE L. AMES ET AL. } No. 15679. At law.

And now comes the plaintiff and saith that the said replication to the first plea of the defendant David Walker is good in substance.

WORTHINGTON & HEALD,
Attorneys for Plaintiff.

Filed May 27, 1879.

Order certifying case to general term.

In the supreme court of the District of Columbia.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator, &c.,
v.
CHARLOTTE L. AMES ET AL. } No. 15679. At law.

The court orders that the demurrers filed and now pending in this case be heard in the general term in the first instance.

July 1, 1879.

9 PROCEEDINGS BEFORE THE SUPREME COURT OF THE DISTRICT OF COLUMBIA IN GENERAL TERM, COMMENCING ON MONDAY, THE 19TH DAY OF APRIL, 1880. PRESENT, CHIEF JUSTICE CARTTER AND JUSTICES WYLIE AND COX.

MONDAY, *May* 3, 1880.

Session resumed pursuant to adjournment. Present, Justices Wylie, Hagner, and Cox.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator, with the will annexed de bonis non, of Horatio Ames,
vs.
CHARLOTTE AMES, ADM'X OF HORATIO AMES, et als.
No. 15679. At law.

Now come here again the parties aforesaid, by their respective attorneys, the cause having been ordered for hearing in the first instance; whereupon, because it appears to this court that the pleas of the defendants
10 Walker and Sawyer, to which the plaintiff filed the demurrers that were pending in the special term on the first of July, 1879, are good in substance, therefore it is considered that the said demurrers be, and the same are hereby, overruled, and that the defendant Walker's demurrer to the plaintiff's replication to his first plea be, and the same is hereby, sustained.

MONDAY, *May* 17, 1880.

Session resumed pursuant to adjournment. Present, Chief-Justice Carter and Justices Wylie, Cox, MacArthur, and James.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator de bonis non of Horatio Ames, deceased,
vs.
CHARLOTTE L. AMES ET AL.
No. 15679. At law.

The plaintiff moves the court to set aside and vacate the order
11 made in this case on the 3rd day of May, 1880, overruling the demurrer of the plaintiff and sustaining the demurrer of the defendants, for the purpose of allowing the plaintiff to discontinue this action as against the defendants, Charlotte L. Ames and Eunice B. Sawyer, the plaintiff hereby agreeing upon such continuance to submit the case to the court, as against the defendant Walker, upon the demurrers without argument.

FRIDAY, *May* 21, 1880.

Session resumed, pursuant to adjournment. Present, Justices Wylie, MacArthur, and Cox.

THE UNITED STATES TO THE USE OF NATHANIEL WILSON, administrator de bonis non of Horatio Ames, deceased,
vs.
CHARLOTTE L. AMES ET AL.
No. 15679. At law.

Upon the motion of the plaintiff of the 17th instant to vacate and

12 set aside the order made herein on the 3rd instant, overruling the plaintiff's demurrers to the pleas of the defendants Walker and Sawyer, for the purpose of allowing the plaintiff to discontinue this action as against Charlotte Ames and Eunice B. Sawyer, it is ordered that said order be, and hereby is, vacated, and that the case be discontinued as to said defendants, the plaintiffs having on the 17th May, 1880, undertaken to submit the case, as against the defendant Walker, upon the demurrers without argument.

13 TUESDAY, *May 25th*, 1880.

Session resumed pursuant to adjournment. Present, Justices Wylie and MacArthur; absent, Justice Cox, indisposed.

THE UNITED STATES TO THE USE OF NATHANIEL Wilson, adm'x de bonis of Horatio Ames, deceased, plaintiff,
vs.
DAVID WALKER, DEF'T. } No. 15679. At law.

And now comes the plaintiff, by his attorney, Mr. Worthington, and submits the case, as against the defendant Walker, without argument, upon the said defendant's demurrer to the plaintiff's replication to his, said defendant's, first plea, and upon the plaintiff's demurrer to said de-
14 fendant's second & third pleas; whereupon, because it appears to the court here that said defendant's first plea is good in substance, and that the plaintiff's replication thereto is bad in substance, therefore it is considered that the defendant's demurrer to said replication be, and the same is hereby, sustained; and because it appears to the court that said defendant's second and third pleas are good in substance, therefore it is considered that the plaintiff's demurrer to said pleas be, and the same is hereby, overruled; that the plaintiff take nothing by his suit, and that said defendant go thereof without day, and recover against the plaintiff the costs of the cause, to be taxed by the clerk, and have execution therefor.

15 In the supreme court of the District of Columbia, the 3rd day of July (Sept.), 1880.

THE UNITED STATES TO THE USE OF NATHANIEL Wilson, administrator c. t. a. d. b. n. of the estate of Horatio Ames, deceased,
vs. } No. 15679. At law. In error.

Know all men by these presents that we, Nathaniel Wilson, administrator de bonis non of the estate of Horatio Ames, dec'ased, and
are bound unto the above-named David Walker in the sum of five hundred dollars, to be paid to the said David Walker, his executors, or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 3rd day of July (Sept.), 1880.

Whereas the above-named Nathaniel Wilson, administrator as aforesaid, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Nathaniel Wilson, administrator as aforesaid, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NATHANIEL WILSON, [SEAL.]
Administrator de bonis non of the estate of Horatio Ames, dec'd.
HENRY BEARD. [SEAL.]

Sealed and delivered in presence of—
D. A. CHAMBERS.

(Indorsed:) 15679. At law. U. S. use of Wilson, ad. d. b. n. of Horatio Ames, v. David Walker. Approved bond.

I accept the within security.

W. D. DAVIDGE,
For Def't in Error.

SEPT. 2, '80.

Approved.

A. B. HAGNER,
Asso. Justice.

SEPT. 3, '80.

Filed Sept. 3, 1880. R. J. Meigs, clerk.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between the United States to the use of Nathaniel Wilson, administrator cum testamento annexo de bonis non of the estate of Horatio Ames, deceased, plaintiff, against David Walker, defendant, at law No. 15679, a manifest error hath happened, to the great damage of the said The United States, use, &c., as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal distinctly and openly to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 3d day of September, in the year of our Lord 1880, and of the Independence of the United States the 105'.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

TO DAVID WALKER:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the United States, use, &c., is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness,

D. K. CARTTER,
Chief Justice of the said Supreme Court of the District of Columbia.

Service acknowledged.

W. D. DAVIDGE,
Att'y for Def't in Error.

OCT. 2, '80.

17 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 2d day of October, 1880.

R. J. MEIGS, *Clerk,*
By ,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs clerk of the said court, to be in due form.

Witness my hand and seal this 2d day of October, 1880.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, Return J. Meigs, clerk of said court, hereby certify that David K Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 2d day of October, 1880.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Assistant Clerk*.

(Indorsement on cover:) No. 87. The United States to the use of Nathaniel Wilson, adm'r &c., of Horatio Ames, deceased, plaintiff in error, vs. David Walker. Dist. of Col. supreme court. Filed 11th October, 1880.

102 U.S.

SUPREME COURT U. S.
FILED
OCT 25 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1883.

No. 87.

THE UNITED STATES, use of NATHANIEL WILSON, Administrator de bonis non of the Estate of HORATIO AMES, Deceased,

vs.

DAVID WALKER.

Brief for the Plaintiff in Error, with Opinion of the Court below annexed.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

Witness my hand and the seal of said court this 2d day of October, 1880.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Assistant Clerk*.

(Indorsement on cover:) No. 87. The United States to the use of Nathaniel Wilson, adm'r &c., of Horatio Ames, deceased, plaintiff in error, vs. David Walker. Dist. of Col. supreme court. Filed 11th October, 1880.

109 U.S. 8

SUPREME COURT U. S.
FILED
OCT 25 1883
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Brief for the Plaintiff in Error, with Opinion of the Court below annexed.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES to the use of NATHANIEL WILSON, administrator c. t. a. d. b. n. of the estate of HORATIO AMES, deceased,
vs.
DAVID WALKER.

No. 87.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

The defendant in error is sued as one of the sureties on the administration bond of Charlotte L. Ames, administratrix of the estate of Horatio Ames by appointment of the Supreme Court of the District of Columbia in special term. She and the personal representative of the other surety were sued with Walker, but the suit was afterwards entered discontinued as to them. (Record, pp. 8, 9.)

The first count of the declaration is upon the bond, without stating the condition, the penalty of the instrument being $120,000. The second count states the bond and avers the condition to be that the administratrix should faithfully perform her office and discharge her duties as such without injury to any person interested in such faithful performance, and assigns as a breach that, after having been re-

moved from office by the court that appointed her, in the settlement of her account as administratrix she was directed by that court to pay over to her successor, the administrator *de bonis non* of Horatio Ames's estate, the sum of $34,876.75, which she had failed to do.

To this declaration a demurrer was interposed, and the ground of the demurrer was stated to be that the administrator d. b. n. has no right to recover for the devastavit of his predecessor (2).

Issue being duly joined, the court after argument overruled the demurrer and gave the defendant leave to plead over (3).

Accordingly, to the first count the defendant pleaded the condition of the bond, and averred performance of it (3, 4). To the second count he pleaded, *first*, that the assets of the estate of Horatio Ames consisted wholly of a claim against the United States, and that the money claimed in this action is the proceeds of that claim, collected and thereby converted into money; and *second*, that the money claimed in this action is for assets and estate which had been administered before his principal was removed from office. To both these pleas the defendant adds that he was not a party to the proceedings in which the order to pay over was passed (4).

In his replication to the first plea (the plea of condition performed) the plaintiff set out three breaches, each of them consisting in the failure of the administratrix to pay over money to her successor in compliance with an order of the court (5, 6).

The plaintiff demurred to the remaining pleas (6). The defendant demurred to the replication to the first plea (6, 7). Issue was duly joined on both demurrers (7), and the court in special term certified them to the court in general term to be heard there in the first instance (7). The court in general term overruled the plaintiff's demurrer, sustained that filed by the defendant, and entered judgment for the

defendant (9). The plaintiff thereupon sued out this writ of error (10).

The opinion of the court below is reported in the Washington Law Reporter, vol. viii, 85, and a copy of it is appended to this brief. The court held (1) that when the administratrix collected the claim against the United States she administered it; and (2) that the decree directing the administratrix to pay over the money so collected to her successor, was not merely erroneous but was void for want of jurisdiction.

This case arises under an act of Congress of February 20, 1846, (9 Stat., 4,) which is incorporated, so far as it relates to this subject, in the Revised Statutes of the District of Columbia, sections 974 to 977. Those sections are as follows:

"SEC. 974. In all cases where the court appoints administrators, or takes bond from any executor to a last will and testament, and shall at any time become satisfied that the security is insufficient, by reason of the removal or insolvency of any of the sureties in the bond, or by reason of the penalty of the bond being too small, or from any other cause, it shall be lawful for the court to order and require the administrator or executor to give other or further security."

"SEC. 975. The court shall have power to remove any administrator or executor who fails or refuses to comply with such order, and to appoint an administrator in his stead."

"SEC. 976. The court shall further have power to order and require any assets or estate of the decedent which may remain unadministered to be delivered to the newly appointed administrator *de bonis non*, and to enforce a compliance with such order by fine and attachment, or any other legal process."

"SEC. 977. The powers granted to the court in the preceding sections may be exercised by the court *ex officio*, or on the application of any one interested."

ASSIGNMENT OF ERRORS.

The court below erred:

1. In overruling the demurrer of the plaintiff to the second and third pleas of the defendant.

2. In sustaining the demurrer of the defendant to the plaintiff's replication to the first plea.

3. In holding that the decree and orders set forth in the second count of the declaration and in the replication to the first plea were not conclusive against the administratrix or her sureties.

4. In holding that the collection of a claim by the administratrix (or her agent) was an administration of it within the meaning of section 976 of the Revised Statutes of the United States relating to the District of Columbia.

ARGUMENT.

I.

As to whether the decree of the Supreme Court of the District of Columbia directing the administratrix to pay over the fund to her successor is conclusive in this proceeding.

The decision of the court below, as appears from its opinion, proceeds upon the theory that since the court which made the order to pay over had power (under sections 974 to 977 of the Revised Statutes of the District of Columbia) only to make such an order as to unadministered assets, its decree was void if the assets were administered. On the other hand, we contend that as the court under the averments of the declaration had undoubted jurisdiction over the administratrix and the estate in her hands—the

person and the subject-matter—its order, even if the assets were administered, was merely erroneous, and could be assailed only by appeal.

The opinion of the court below is largely based upon its interpretation of the opinion of this court in Windsor *v.* McVeigh, 93 U. S., 274, in which it is said that it does not follow from a court having jurisdiction of the parties and the subject-matter that any order it may make concerning them is also within its jurisdiction, and in which various illustrations of this truth are given; as, for instance, that in a suit upon a money demand the defendant cannot be sent to the penitentiary.

But in this as in all the other illustrations on the same point made by this court, the supposed illegal order is one which the court had no power to make under any state of facts. If a defendant who had been sued on a promissory note and had judgment entered against him should, in a suit on that judgment, claim that it was void because the obligation was a bond and not a note, we should have a case more like the one at bar. And *such* illustrations are to be met with everywhere in the reports of actual cases.

In Irwin *v.* Backus, 25 Cal., 214, an administrator, who had been removed and ordered to turn over to his successor the amount with which he was found to be chargeable on a settlement of his accounts, was sued by the administrator *de bonis non.* His defence was that there was no such balance. But the order of the Probate Court was held to be conclusive.

In White *v.* Weatherbee, 126 Mass., 450, the defendant, an administrator, by a decree of distribution in the Probate Court, had been directed to pay a sum of money to "John N., administrator of William N.," and, having failed to comply with the order, suit was brought to enforce it. The defence set up was that John N. was not administrator of William N. The court held that the order of distribution "necessarily involved the question whether John N. was

the lawful administrator of William N.," and that that question was therefore *res adjudicata*.

So it was held by this court in Caujolle *v.* Ferrie, 13 Wall., 465, that when a surrogate, who was obliged to grant letters of administration "to the relatives of the deceased who would be entitled to succeed to his personal estate," had granted letters to an alleged son, after trying the question of his legitimacy, his decision was binding on all other courts. Says the court:

"They [the appellants] say the point was only cognizable incidentally; but how can this be when the surrogate could not have done the thing he did do without deciding it?" (Page 471.)

When a court of competent jurisdiction had set aside a deed as void under an Ohio statute, and had appointed an assignee to sell the property conveyed and distribute it under the statute, it was held that the same parties could not in another court raise the question *whether the deed was within the statute.*

Hellebush *v.* Richter, 37 Ohio St., 222.

In England, when the proper court had decided that a minor, who was a pauper, was a charge upon the town of L. *because* he was the lawful child of A and B, and they were domiciled in L., it was held that this was conclusive against L. on the question whether B, the mother (also a pauper), was a proper charge against it. (See Reg. *v.* Hartington, 82 E. C. L. R., 780; Reg. *v.* Wye, 34 E. C. L. R., 399.) The ground of these decisions is stated to be that the rule as to facts collaterally in issue does not apply when the facts are necessary steps to the judgment.

In another English case, under the law for winding up joint stock companies, A was put upon the list of contributories as a shareholder. It appeared that when the company was carrying on business it had sued him at law upon his alleged subscription and been defeated. This was

held to be conclusive in his favor in the winding-up proceedings, because, although it did not *expressly* appear in the record at law that it was there decided he was not a shareholder, yet that was the necessary inference from the record. (Re. Bank of Hindustan (in chancery, on appeal), 22 W. R., 113.)

Among the many other cases to the same effect, the following are especially worthy of consideration:

Ralston *v.* Wood, 15 Ill., 159.
McPherson *v.* Cumliff, 11 S. & R., 29.
Ex parte Harper, 10 L. R. Ch., 379.

To none of the above cases would the doctrine of Windsor *v.* McVeigh apply. The judgments or decrees to which they refer were those which the court making them had power to make, given certain facts appearing in evidence; and the express decision in some, as well as the implied decision in others, that such a state of facts existed, was held conclusive, although in all of them the endeavor was made to show that the fact relied on had not existed. As was said in Allman *v.* Taylor, 101 Ill., 185:

"When a court once obtains jurisdiction of the persons of the parties and the subject-matter of the litigation, no matter if it may thereafter erroneously proceed, *within the bounds of its jurisdiction* its decrees will be conclusive."

Or, as was said by the Court of Appeals of New York, in Hunt *v.* Hunt, 72 N. Y., 230:

"If he [the suitor] does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be so valid and effectual as to bind him thereafter. * * * If that court, however, should err, and give judgment that he had made out his case, jurisdiction remains in it so to do. The error is to be corrected in that very action."

Many of the cases above cited grow out of the orders or decrees of probate courts. That the decrees of those courts within their jurisdiction are as conclusive as those of other judicial tribunals, is everywhere held.

Wells' Res Adjudicata, secs. 425, 426.
Freeman on Judgments, secs. 607, 608, 612.
3 Redfield on Wills, 56.
Grignand *v.* Astor, 2 How., 319.
Florentine *v.* Barton, 2 Wall., 210.
Voorhees *v.* Bank U. S., 10 Peters, 449.

It is thought necessary to cite these cases because it was contended below that the decrees relied upon in this action are at the most only *prima facie* evidence of the fact that Mrs. Ames when removed held unadministered assets, and that this is overcome by the admission contained in the declaration that the fund was one she had collected from the Government. It is true that in Maryland it has sometimes been said that the order of the Orphans' Court passing an administrator's account is only *prima facie* evidence of its correctness; but this has alweys been on the ground that the administrator should not, by an *ex parte* proceeding, be permitted to conclude creditors and others interested in the estate. When the decree is not an *ex parte* one it is as conclusive in Maryland as elsewhere.

Hannen *v.* Gill, 2 Gill, 42.
Raberg *v.* Hammond, 2 H. & G., 49.
Cecil *v.* Cecil, 19 Md., 79.

It is hardly necessary to add that if the decrees in question are conclusive against the administratrix, they are also conclusive as to the defendant in error, her surety.

Stoval *v.* Banks, 10 Wall., 583.
Heard *v.* Lodge, 20 Pick., 53.
Irwin *v.* Backus, 25 Cal., 214.
Garber *v.* Commonwealth, 7 Penn. St., 265.
White *v.* Weatherbee, 126 Mass., 450.

II.

As to whether the collection of the fund from the Government by the administratrix was such an administration of it as takes it out of the statute in question.

This branch of the argument is simply an inquiry into the meaning of the word "unadministered" in section 976 of the Revised Statutes of the District.

The word administer as applied to the acts of an administrator has two well-known significations. It sometimes means to settle—to wind up. An administrator who, being sued as such, should plead that he had fully administered the estate, would not think of supporting that plea by proof merely of the conversion of the assets into money. That would simply go towards establishing his liability. To sustain his defence he would have to prove that he had distributed, and distributed legally, the entire estate. So if we say in ordinary conversation that an estate was administered by A, every one understands us to mean that A had settled up that estate. On the other hand, by the common law, and in Maryland under statutes enacted prior to the cession of the District and still in force here, the words "not administered," as used in the commission of an administrator appointed to take the place of a *deceased* administrator, have been held to mean not changed in form—remaining in specie.

The court below termed the first of these meanings the "popular" one and the other "legal and technical," and while it admitted that the latter construction makes the act in question a very defective one, it felt obliged to adopt it.

The error of the court below, as we think, lies in its failure to appreciate the fact that what it terms the "popular" sense of the word administer is just as much a "legal and technical" sense as the other. A few examples will demonstrate this.

In section 3 of subchapter 10 of chapter 101 of the Maryland act of 1798, (2 Kilty's Statutes,) the word administered is used three times in the sense of *distributed*.

In Blackinston *v.* Blackinston, 2 H. & G., 139, (decided in 1828,) an executor who had been sued in debt by a creditor of the estate filed a plea *puis darrein continuance*, averring that the Orphans' Court had revoked his letters. This plea was demurred to. The court say:

"The plea does not set forth the appointment of an administrator *de bonis non*, much less that agreeably to the acts of the assembly all the *unadministered* estate of the deceased has, under the order of the Orphans' Court, been delivered over to such substituted administrator. * * * At the time of the institution of the suit the equitable plaintiff had a good cause of action. The bond of the plaintiff had become forfeited by his failure to distribute the *unadministered* effects of the deceased as required by law. * * * He is deprived of no honest defence. If no assets have come into his hands; if he has *administered* them, * * * it may be pleaded in bar of the action."

In a suit in Pennsylvania by an administrator *de bonis non* in place of one who had resigned, against his predecessor, for the balance with which the first administrator had been charged in the settlement of his account by the Orphans' Court, the right of the plaintiff to sue for such balance being controverted, the court said:

"The incapacity under which an administrator *de bonis non* labored previous to the act of the 24th of February, 1834, to recover the assets in the hands of the representatives of a prior executor or administrator who had died, arose from the want of title to the property of the decedent not remaining in specie. That reason does not apply in the case of a dismissed executor or administrator, because the third section of the act of the 4th of April, 1797, expressly gives to the successor the administration of the *unadministered* part of the estate, and directs that the dismissed party surrender up the residue of the estate. This residue comprehends all the goods, chattels, property,

effects, and money of the decedent remaining in his hands. There is no reason why any portion of the estate should longer remain in the hands of an officer whose functions are terminated, and who has become a stranger in respect to the estate without capacity to *administer* it himself or transmit it to others." (Weld *v.* McClure, 9 Watts, 495.)

In the case of Wermick *v.* McMurdo, 5 Randolph, 51, the question of the meaning of this word "administered" in the commission of administrators d. b. n. received perhaps the most careful examination ever given to the subject; and while a majority of the judges there held that in Virginia the administrator d. b. n. of a *deceased* person was entitled only to assets remaining in specie or money kept by itself, the whole discussion proceeds upon the assumption that this technical meaning of the word is confined to that particular case. For instance, on page 83, Green, J., says that when a wrongful administration has been *revoked* a creditor may sue the displaced administrator, and he can only defend himself by showing that he has legally *administered* all the assets except those delivered over to the succeeding administrator or executor.

Again, (on page 92,) he says the plea "fully administered" means *legally administered*, and argues that the decision he is rendering is not inconsistent with that use of the word.

It will be seen that where the first administrator has been *removed* the words "not administered," in the commission of his successor, may have a very different meaning from that which ordinarily attaches to them in the commission of an administrator who takes the place of a deceased administrator. In many if not in most of the States the administrator who supplants a living administrator is given by statute the express right to call his predecessor to account, yet he is still termed administrator *de bonis non* [*administratis.*] The reason of this distinction is obvious. When an administrator dies his executor or administrator

takes possession of his effects and closes up what as administrator he had begun; while, when an administrator is removed (or resigns) he has no representative to act for him, and as he is removed because he is unfit (or resigns because he is unwilling) to go on with the administration, his successor is the person to whom naturally the winding up of the estate is to be intrusted. Hence, while the words "not administered," in the commission of an administrator *de bonis non* in place of a deceased administrator, still frequently mean *not changed in form*, yet, as applied to an administrator *de bonis non*, in place of a living administrator, they have come to mean almost invariably *not fully and legally administered.*

This distinction appears nowhere more clearly than in the laws of Maryland in force in this District. Chapter 101 of the Maryland act of 1798, (2 Kilty's Laws,) still mainly governs probate business in this District. The following are extracts from that chapter which are still in force here:

Sub-chap. 5, sec. 5: "And in all cases where letters testamentary shall have been granted as aforesaid [in case of discovery of a will and consequent *revocation* of letters of administration] it shall be the duty of the administrators to exhibit to the Orphans' Court their accounts without delay, and to deliver to the executor, on demand, all the goods, chattels, and personal estate in their possession belonging to the deceased; and on failure, their administration bonds shall be liable to be put in suit by the executors, or the executors may obtain an order for the purpose."

Sub-chap. 6, sec. 13: "If an executor or administrator shall not, within three months after the date of his letters, exhibit to the Orphans' Court an inventory as aforesaid, a summons, returnable within not less than eight or more than thirty days, may, *ex officio*, or on application of a person interested, be issued against such executor or administrator, to show cause wherefore such inventory hath not been exhibited, and if the summons be only returned 'summoned,' or, upon two citations, returned '*non est*' by

the sheriff of the county wherein the party resided at the time of obtaining his letters, or of the county wherein the letters were obtained, in case the party doth not reside in the State; and if he doth not appear at the return of the summons, or, appearing, shall not show cause satisfactory, the said court may immediately enter on its proceedings, and record that the said letters be *revoked*, and may proceed to grant other letters, in the same manner as if such executor had not been named in the will, or as if such administrators were not in existence; and the power of such executor or administrator shall thereupon cease, and he shall be bound to deliver up, on demand, to the person obtaining such letters, all the property of the deceased in his hands, or be liable to be sued by such person on his administration bond, or the court may pass an order for the purpose."

Sub-chap. 10, sec. 9: "If an executor or administrator shall fail to return an account, as hereinbefore directed, within the time limited by law, or by the court, his letters, on application of any person interested, may be *revoked*, and such administration (as the case may require) may be granted at discretion of the court, and the administrator to whom letters shall be granted shall be entitled to put the delinquent's bond in suit, and to recover such damages thereon as the jury may find; and in assessing such damage it shall be the duty of the jury to allow such sum as will be equal to six *per cent. per annum* on the amount of the inventory or inventories from the time of the return or the returns to the time of the verdict, over and beyond the damages, for such loss or injury as the estate may have sustained by the delinquent's conduct."

Sub-chap. 14, sec. 2: "If an executor or administrator shall *die* before administration is completed, letters *de bonis non* may be granted, at the discretion of the court, with a copy of the will annexed, (if the case require,) giving preference, however, to the persons entitled, if he or she shall actually apply for the same, and the form of the letters shall be as hereinbefore directed, except that the words 'already not administered' be added in their proper place; and the authority conferred by such letters shall be to administer all things therein described as assets, not converted into money, and not distributed, or delivered, or retained by the former executor, or administrator, under the court's direction."

It thus appears that in this District prior to 1846, when the power of the administrator was terminated by the revocation of his letters, his successor was authorized to call him and his sureties to account for all assets of the estate remaining "in his hands" or "in his possession"; while in case of his death his successor took only assets remaining in specie.

In some of the States the same distinction exists or has existed, and in more the representatives of even a deceased administrator are accountable only to the administrator *de bonis non*. (See, for instance, Marsh *v.* People, 15 Ill., 284; Duffin *v.* Abbott, 48 Ill., 17; State *v.* Hunter, 15 Mo., 490; Tracy *v.* Card, 2 Ohio St., 431; Ferebee *v.* Baxter, 12 Ired. L., 64.) Experience has shown that it is more expedient to commit the right of action against a removed administrator, or the estate of a deceased one, to a single person, the administrator *de bonis non*, and the courts accordingly, in doubtful cases, construe statutes to that effect; so that the modern tendency is to enlarge the meaning of the words "not administered" in the commission of administrators *de bonis non*.

Thus, in Jewett *v.* Jewett's Administratrix, 5 Mass., 275, the defendant pleaded that since the last continuance she had been removed and a successor appointed. This plea was demurred to on the ground that by the statute (as her counsel construed it) she was authorized to retain money to meet suits pending at the time of her removal. But the court (by Chief Justice Parsons) said that while that was so at common law, yet such a course would enable her to pay one creditor in full to the possible injury of others, and she should therefore turn over all the assets to her successor; *and that the court would not so construe the statute as to permit the suit to go on.*

So in New Jersey it was held that a statute authorizing the removal of an administrator and the appointment of his successor *should, if possible, be construed to give the new*

administrator the right to recover all claims of the estate against his predecessor, including those growing out of his waste of the assets; because if one creditor can sue alone, he may get more than his proportion of the assets. The rule of construction thus laid down is said by the court to be in harmony with the decisions of other States. (McDonald *v.* O'Connell's administrators, 43 N. J. L., 33.)

A statute of Pennsylvania, enacted in 1834, authorized administrators *de bonis non* to recover "from their predecessors or their legal representatives" all assets "remaining in their hands;" and the Supreme Court of that State holds that this means assets that *ought to* be in their hands; that is, all assets not fully and legally administered, (Carter *v.* Trueman, 7 Pa. St., 315.) The difficulties that beset creditors of an estate upon the death of the administrator and the benefits of the act of 1834 are dwelt upon in Drenkle *v.* Sharman, 9 Watts, 485.

In Tracy *v.* Card's Administrator, 2 Ohio St., 431, the court (by Thurman, J.) say that a statute authorizing an administrator *de bonis non* to sue a removed *executor* for the assets not disposed of according to law, should be liberally construed; and accordingly it was held to apply to removed administrators.

Without exhausting the cases, the foregoing are sufficient to demonstrate that the words "not administered" in the commission of an administrator *de bonis non*, construed in a "legal and technical" and not in a "popular" sense, frequently mean *not finally disposed of according to law—not fully and legally administered;* and that such is their usual meaning when the first administrator is still living. It is not denied that the words sometimes mean *not converted.*

It remains only to inquire in what sense Congress used the equivalent word "unadministered" in the act of 1846. And here no argument is required. To read the act is all that is necessary. The construction for which we contend, as the court below could hardly deny, accords with the

obvious purpose of the statute; while the construction insisted upon by the defendant in error will cause it to fail probably in the majority of the cases it was intended to meet. The one construction is in harmony with the acts of the Maryland Legislature *in pari materia*, and with the decisions of other courts under similar statutes; while the other would present us in this case with the anomaly of an administratrix removed because her sureties are insufficient, authorized to administer, as though she had not been removed at all, the fund that is in peril.

III.

Some other questions that were raised in the court below but which are not mentioned in the opinion of that court, will now be briefly considered.

1. Non-compliance with the act of 1720, chapter 24.

That act, (1 Kilty's Statutes,) after reciting the "pernicious practice" of putting administration bonds in suit for "the non-payment of small debts recovered in the county courts," provides that it shall not be lawful for *creditors* to sue on such a bond without showing either that the administrator cannot be served with process, or that he has not assets sufficient to pay the judgment; and for a violation of the act the penalty affixed is that the plaintiff shall be taxed with the costs of his premature suit.

It will be seen that compliance with this act is averred in the second count of the declaration, (2.) And it is further averred that Mrs. Ames is a non-resident, and is insolvent. These allegations were made out of abundant caution, since it is plain the act has no application to the case of a suit for failure to comply with an order of the Orphans' Court; and the subsequent act of 1798, chapter 101, as has been seen, expressly provides that when an administrator has been removed and has failed to deliver to his successor the assets in his hands, his administration bond may be put in suit.

2. Again, it has been claimed that the act of 1846, under which Mrs. Ames was removed, does not give the administrator *de bonis non* the right to sue his predecessor for the assets of the estate, but merely provides that the order to deliver over the assets may be enforced by the court by fine and attachment, or any other legal process.

But this statute is to be construed *in pari materia;* and as in all the other cases of removal the right to sue on the bond of the first administrator is given to the administrator *de bonis non*, it is reasonable to suppose that it was intended to continue that privilege when a new cause of removal was added. Moreover, a right of action arises from the decree without a positive declaration to that effect. The Pennsylvania act of 1834, already referred to, like our act of 1846, gave the Probate Court express power to enforce by attachment its order to the removed administrator to pay over to his successor the assets "remaining in his hands," but, like our act, was silent as to the remedy by suit. In Weld *v.* McClure, *supra*, it was contended that the plaintiff had no right to bring the suit. But the court said:

"Then, if the administrator *de bonis non* was entitled to receive that balance, and the executor was directed to pay it over to him, and bound to do so, an action lies to recover it. The decree of a court directing that money be paid makes it a debt for which an action lies at common law, and though there might be another remedy by attachment, yet that is not the sole remedy, and in some cases would be less efficient than an action. We are of opinion that the action was maintainable."

3. It is claimed that a demand upon the administratrix for the payment of the fund sued for should have been averred. It would seem that the allegation of a suit against her and return of *non est inventos*, with the further averment that she is a non-resident and insolvent (2), should satisfy her surety so far as the second count of the declara-

tion is concerned. In the replication to the plea to the first count it is set out that the order for her removal and for the payment of the fund to her successor was made after due notice to her, and, as to the third breach, that she charged herself with the sum of $3,650.42 as a balance for distribution. It became her duty, therefore, to comply with the order; and no demand was necessary. As well might a defendant who has been cast in an ordinary action at law claim that he should be asked to pay the judgment before execution could issue.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.

Supreme Court, District of Columbia.

UNITED STATES, USE OF N. WILSON, administrator d. b. n. of Horatio Ames,
v.
CHARLOTTE L. AMES, DAVID WALKER and EUNICE B. SAWYER, administratrix of Fred. P. Sawyer.

COX, J., delivered the opinion of the court.

This is an action on an administration bond against a surviving administratrix, one of her sureties and the administrator of another surety, by the administrator *de bonis non, cum testamento annexo* of the same estate. The defendant Charlotte L. Ames, administratrix of Horatio Ames, was not served. The other defendants appeared and defended.

The declaration contains two counts.

The first is a general count in debt for the penalty of the administration bond. To this the defendants plead, generally, performance of the condition of the bond by the administrators. The plaintiff replies by assigning, as breaches, that Charlotte L. Ames, as administratrix, collected from the United States a large sum of money, $39,955, which she allowed to remain in the hands of her agent until, by decree of the Orphans' Court, she was removed from her office, and the plaintiff, N. Wilson, appointed administrator in her place, and she was ordered to transfer to him all moneys and assets belonging to said estate, &c., and that she has never paid said sum; that in the settlement of her accounts she was charged with the sum of $34,876.75, and directed by decree of said court to turn it over to plaintiff Wilson, which she has never done; that she had filed her account in said court, charging herself with a certain balance for distribution, resulting from collections from the United States, and was directed by decree of said court to pay said balance to said plaintiff, and has not done so. To this replication the defendants demur.

The second count of the declaration sets out the condition of the administration bond, and avers, as a breach, that in the settlement of the account of the administratrix she was directed, by a decree of the Orphans' Court, to pay

over to the plaintiff, N. Wilson, administrator *de bonis non, cum testamento annexo* of the estate of Horatio Ames, the sum of $34,876.75, which she has failed to do. The defendants plead to this, that the money claimed is the proceeds of a claim against the United States, collected and converted into money by the administratrix, and thereby *administered* by her before her removal from office, and that they ought not to be precluded by the decree of the Orphans' Court from showing this, as they were not parties to the proceeding in which it was passed. These pleas are demurred to by the plaintiff.

In both lines of pleading the same important fact appears, viz., that the breach complained of consists of the omission of the original administratrix, after she was removed from office, to pay over to her successor, the administrator *de bonis non*, in pursuance of the decree of the Orphans' Court, certain moneys which she had collected from the United States

The plaintiff's replication to the defendant's first plea, avers that the money was so collected by the administratrix, and the defendant's second and third pleas, which are admitted to be true by the demurrer of the plaintiff to them, aver the same fact, with the addition that the money was the proceeds of a chose in action belonging to the decedent, in the shape of a claim against the United States, and was administered. Of course, however, the admission by the demurrer, that the money was administered, does not conclude the plaintiff as to the question what amounts *in law* to administering.

The case is heard here in the first instance, and the demurrers present two questions, viz.: first, whether, independently of the decision of the Orphans' Court, the administrator *de bonis non* is entitled to the money in question; and secondly, whether, independently of this question, the decree of the Orphans' Court is conclusive, until reversed, of the plaintiff's right to the money, and it was a breach of the condition of the bond not to obey it.

In the case of Wilson *v.* Arrick we have already considered the first question, and came to the conclusion that money collected by an executor or original administrator, unless at least specially set aside and specifically designated as the assets of the deceased, is administered assets, for which the original administrator is to account directly to

the creditors, legatees or distributees of the deceased and not to the administrator *de bonis non*. Hence we are compelled to answer the first question in the negative.

But it is maintained by the plaintiff, as one of the grounds of demurrer to defendant's pleas, that the decree of the Orphans' Court cannot be collaterally impeached, and, until reversed, is conclusive of the plaintiff's right to the money, both against the administratrix and her sureties.

In considering this question, it is always to be borne in mind that the pleadings, according to our view of the law, admit the facts fatal to the plaintiff's claim to the money, or, in other words, admit that he is not entitled to it, unless in virtue of this decree. So that the position of the plaintiff must be, either that the decree, until reversed, is binding, though erroneous in point of law on its face, or that the Orphans' Court must be presumed to have decided the existence of facts which would sustain it, and that this decision, though erroneous in fact, is conclusive.

The facts clearly presented on the record are that this money was administered assets, and that the court decreed it to be paid over to the plaintiff, which was an error.

The important question is whether this is only an error which is to be redressed on appeal, or is an excess of jurisdiction.

It is urged, on plaintiff's part, that the Orphans' Court had jurisdiction over the person of the administratrix and over the assets, and that the disposition of these assets by its decrees was one of the plainest of its powers, and that consequently, if an error was committed therein, it was simply an error and not a nullity.

It is too broad a proposition that where a court has jurisdiction over a person and a subject-matter, it may pass any decree in relation to them, and that such decree, however erroneous, cannot be collaterally assailed. On the contrary, even in case of admitted jurisdiction over person and thing, there are decrees which a court has no jurisdiction to pass. This was illustrated by the Supreme Court in the case of Windsor *v.* McVeigh, 93 U. S., 274.

As that court say: "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgment. It must act judi-

cially in all things, and cannot then *transcend the power conferred by law*. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit, in the case, the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the case supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, in the case of ex-parte Lange, 18 Wall., 163; so it was held by this court, in Bigelow *v.* Forrest, 9 Id., 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life estate of the owner. To the objection that the decree was conclusive, that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court *having jurisdiction to make the decree*, cannot be impeached collaterally, but under the act of Congress the District Court *had no power to order a sale*, which should confer upon the purchaser rights outlasting the life of French Forrest, (the owner.) Had it done so, it *would have transcended its jurisdiction*."

The same principle is asserted in ex parte Lange, supra, and vindicated at length.

Now, it is true that the Orphans' Court had jurisdiction over the administratrix and estate of Horatio Ames. But to pass decrees which it had no power by law to pass, would be transcending its jurisdiction and such decrees would be nullities. If the court had directed the whole estate to be applied to public charities, would such a decree be merely error? Or if, before the act of Congress of 1846 passed, the court, without any authority of law, had undertaken to remove an administrator, as that act directs, and ordered payment of the estate to the administrator *de bonis non*, would such a decree have been conclusive until reversed? Or, if the act of Congress had expressly directed all mon-

eys collected by an executor or original administrator to be accounted for directly by him to the parties interested, and not to be paid to the administrator *de bonis non*, would a decree in direct opposition to the act be merely erroneous but conclusive until reversed? We think but one answer can be given to these inquiries, and that all such decree would have to be treated as simply void.

We can easily distinguish between cases like these and mere errors which are unassailable collaterally. If, for instance, in admitting a will of personalty to probate, or in the construction of it, or in determining the rights of legatees or distributees under it, *or in the construction of the law of distribution* in case of intestacy, the court should err, it must be remedied by appeal. If the Orphans' Court had been invested with the power to decide the title of all persons to the personal estate of the deceased, an erroneous decision that administered assets would pass to the administrator *de bonis non* would be binding until reversed.

But the Orphans' Court is one of limited statutory powers. The act of Congress gives it *express* power to direct the delivery of unadministered assets by a displaced administrator to his successor, and this impliedly excludes the power to give administered assets the same direction. A decree in the latter sense would exceed the power of the court and, according to the principles laid down, transcend its jurisdiction.

It is said, however, that the court, in the exercise of its power over this question, had to determine whether the assets in question were administered or not; that its determination of that question was within its jurisdiction, and we must presume that the court did determine the facts necessary to the validity of its judgment.

A judgment or decree is conclusive, in any case, only of questions actually presented to and determined by the court. If it had appeared in the pleadings or in evidence, that the plaintiff had petitioned the Orphans' Court for the decree in question, averring that the money in question was the actual money owned by the decedent, in the shape of certain coins tied up in bags and labelled so as to distinguish it from his general funds, or even that the administrator had collected it, but had so designated and set it aside, and on that ground the plaintiff claimed it to be specific and unadministered assets, and the court on hearing had de-

termined the *facts* to be as alleged, it would perhaps be impossible for the defendants to avoid the conclusiveness of such a judgment. For, ordinarily, the decisions of a court upon even jurisdictional facts, i. e., facts necessary to sustain its jurisdiction, are considered binding, and here would be a decision of a court of competent jurisdiction on the identical cause of action involved in this suit, to wit, the plaintiff's right to this identical money. And it would perhaps be held to be a decree *in rem*, conclusive against every one. But such is not the case presented in this record. It simply shows that the court decreed certain administered assets to be paid over to the administrator *de bonis non*.

In the view I am considering, the decree is relied on as an estoppel on the question of fact, whether the assets were administered. But to its effect for that purpose, it is necessary to help it out by presuming that the court decided a fact without which its decree is erroneous. We are not aware of any rule which requires us to do this. If, as I have already said, the issue of fact had been distinctly made, and the court could not have rendered its decree without deciding the fact in question, then we might be compelled, with a proper state of pleadings, to regard the decree as an estoppel. But when we see that the court may have based its decree upon an erroneous assumption of law, there is no rule that requires us to presume a state of facts in order to sustain it as a valid decree.

We cannot, therefore, regard this decree as conclusive of the *fact* that these were unadministered assets.

But, besides this, we do not see how the plaintiff could avail himself of such estoppel in this suit. According to our view of the law, as before expressed, the pleadings, on both sides, admit these assets to be administered, and these pleadings estop the parties from denying it for the purposes of this case. An estoppel, at most, is evidence. It is the actual or constructive admission of a party, which is held to conclude him. But when the other party also conclusively admits of record the opposite state of facts, how can he avail himself of his adversary's admission? As expressed in Sinclair *v.* Jackson, 8 Cowen, 543, "where verity is apparent in the same record, there the adverse

party shall not be estopped to take advantage of the truth."

Had the decree of the Orphans' Court been simply erroneous, either in law or fact, other embarrassing questions would have presented themselves, such as the question whether the decree against the principal would be binding and conclusive against the sureties. But as we consider the decree void, as in excess of the power of the Orphans' Court, it is unnecessary to consider them.

On the whole, we are of opinion that, on the demurrers, judgment must be for the defendants.

4

Supreme Court, District of Columbia.

N. WILSON, administrator,
v.
CLIFFORD ARRICK. } No. 14,380.

Mr. Justice Cox delivered the opinion of the court:

This case comes to us on exceptions to the rulings of the court below. The principal exception is to an instruction given by the court to the jury.

The facts assumed as the basis of the instruction are, that Horatio Ames, deceased, had a large claim against the United States; that Clifford Arrick was the attorney to prosecute the claim for him in his lifetime, and, after his death, continued to act in that capacity for Charlotte L. Ames, his administratrix; that Arrick collected on account of said claim, besides other amounts, the sum of $39,955, for which the administratrix gave her receipts to the United States; that she allowed Arrick $33,574.36 for his services in prosecuting the claim, and took receipts from him for that amount; that she filed an account in the Orphans' Court of this District, in which she charged herself with the $39,955, and claimed credit for the amount so allowed to Arrick, filing his receipts as vouchers therefor, and showing a balance for distribution of $3,650.42; that the Orphans' Court, in settling the account of the administratrix, found her chargeable with a balance of $34,876.75, removed her from office for failure to give additional security, appointed N. Wilson, esq., administrator d. b. n., c. t. a., and directed the administratrix to pay over the said sum of $34,876.75 to the administrator d. b. n., the plaintiff.

The whole amount collected by Arrick, as far as appears, was retained by him, and this suit is brought against him by the administrator d. b. n., claiming to be entitled to the above balance by virtue of sections 974, 975, and 976 of the Revised Statutes, which are the reproduction of an act of Congress of February 20, 1846, (9 Stats. at Large, p. 4,) in the following words, viz:

"SEC. 974. In all cases where the court appoints administrators, or takes bond from any executor of a last will and testament, and shall at any time become satisfied that the

security is insufficient by reason of the removal or insolvency of any of the sureties on the bond, or by reason of the penalty of the bond being too small, or from any other cause, it shall be lawful for the court to order and require the administrator or executor to give other or further security.

"SEC. 975. The court shall have power to remove any administrator or executor who fails or refuses to comply with such order and to appoint an administrator in his stead.

"SEC. 976. The court shall further have power to order and require any assets or estate of the decedent, *which may remain unadministered*, to be delivered to the newly appointed administrator *de bonis non*, and to enforce a compliance with such order by fine and attachment or any other legal process."

The plaintiff, the administrator d. b. n., claims that the funds shown to have been collected and retained by the defendant, Arrick, were an unadministered part of the estate of Horatio Ames to which he became entitled by virtue of his appointment and the order of the Orphans' Court, and the question presented in the record and discussed in the argument is, whether the fund in question is *unadministered* in the sense of the statute.

The term "*unadministered*" is a legal and technical one, and its signification, as employed in the act of Congress, is to be sought for, not in the dictionaries, but in antecedent legislation and judicial decisions.

By the English law, as administered in the ecclesiastical courts, an administrator who is displaced is required to account directly to the persons beneficially interested in the estate for money collected or realized from sales by him. The administrator d. b. n. only admisters goods, chattels, and credits of the deceased which have not been administered. He is entitled to the goods and personal estate remaining in specie.

Money which belonged to the original intestate and was kept by itself so as to be capable of identification as the property of said intestate, would pass to the administrator *de bonis non*. Beall *v.* New Mexico, 16 Wallace, 535.

The old authorities have gone a step farther and held that money collected by an executor or administrator in

that character, *and laid by itself*, will also pass to the administrator d. b. n., because, as Salkeld says (p. 306), if the goods of the testator remain in specie, they shall go to the administrator d. b. n., because in that case it is notorious which were the goods of the testator, and there is the same reason where money is kept by itself.

Subject to this, it is the rule that if a change was made by the executor or administrator in the condition of the property left by the testator or intestate, as by taking a note for a debt due the decedent or collecting such a debt, so much of his estate was considered *administered*, in a technical sense, so as to make the executor or administrator and his sureties directly responsible for its value to the parties interested in the estate, and in case of his death an administrator d. b. n. could only take other property not so converted but remaining in specie. And such was the law in Maryland. See Hagthorp *v.* Hook, 1 G. and J., 270; Sibley *v.* Williams, 3 G. and J., 52; Neale *v.* Hagthorp, 7 G. and J., 13; Lemmon *v.* Hall, 20 Md., 171; Kearney *v.* Ladcer, 37 Md., 264.

The act of assembly of 1798, c. 101, sub-ch. 14, virtually defines the term "not administered." After giving the form of letters testamentary, by which administration of all the goods, chattels, and credits of the deceased is granted to the executor, it provides that the form of letters of administration d. b. n. shall be the same except that the words "*already not administered*" shall be added in their proper place. And then it provides that the authority conferred by such letters shall be to administer all things described in the act as assets *not converted into money*, and not distributed or delivered or retained by the former executor or administrator under the court's direction. The necessary implication is that things converted into money or specific things distributed or delivered or retained by the first executor or administrator under order of the court, do not pass to the administrator d. b. n. And as he is to administer all the goods, &c., not already administered, it necessarily follows that assets converted into money were, in the sense of the law, administered. Every species of personal property belonging to the deceased was assets; consequently choses in action are such, and, when collected, they are converted into money, and, in the sense of the statute, *administered*. This is the construction given to the act of 1798 by

the Maryland authorities. The same view was taken by the United States Supreme Court in De Valengin's Administrators *v.* Duffey, 14 Pet., 282. The administrator of a decedent had collected a claim against a foreign government, or, in other words, converted it into money, invested this money in coffee, and afterwards sold the latter, and before distributing the money died. Before his death, however, another person, who claimed to be the real owner of the original claim, brought suit against the administrator for the money collected by him. After the latter's death, on the question whether the suit should be continued against the administrators' representatives or the administrator d. b. n., Judge Taney said:

"If this transaction had taken place before the act of assembly of Maryland of 1820, ch. 174, the suit must unquestionably have been continued against the representatives of Neal, (the administrator,) and could not have been sustained against the administrators d. b. n. of De Valengin, (the original decedent,) because the property which Neale had received as administrator was converted into money in his lifetime, and must, therefore, have been accounted for by his administrator, and would not have passed to the administrator d. b. n. of the former intestate."

The act of 1798, as thus interpreted, was the law of this District also.

The late Circuit Court of the District, in 1823, in the case of Calder *v.* Pyfer, 2 Cr., 430, held that an administrator d. b. n. could not bring an action for the price of goods of the decedent sold by the original administrator.

In the case of Ennis et al. *v.* Smith et. al., 14 How., 400, 416, the Supreme Court say:

"We understand by the laws of Maryland, as they stood *when Congress assumed jurisdiction over the District of Columbia*, that the property of a deceased person was considered to be *administered* whenever it was sold, or converted into money by the administrator or executor, or in any respect *changed from the condition in which the deceased left it.* It did not go to the administrator d. b. n., unless on the death of the executor or administrator; it remained in specie, or *was the same then that it was when it came to his hands.* When the assets have been *changed* it is said in Maryland that the property has been *administered*."

They further say that the obligations of Bomford, administrator d. b. n. of Kosciusko and of his sureties, are determined by what has been the judicial interpretation and administration of it in Maryland, uncontrolled by any decisions of other courts elsewhere, and that it must be admitted that the original sureties of Bomford as administrator d. b. n. of Kosciusko were not, under the Maryland law, bound for assets in his hands in the shape of money collected by Lear, original administrator of Kosciusko, and received by him as executor of Lear.

This, therefore, was clearly the condition of the law of this District in 1846, to wit, that when an executor or original administrator had collected money, or choses in action, or converted chattels into money by sale, this much of the estate was considered as technically administered, so as not to go into the hands of an administrator d. b. n., as unadministered assets, *at least* unless the money so received was laid aside, so as to be identified as the property of the decedent.

Congress then passed the act of February 20, 1846, which is embodied in the sections of the Revised Statutes already quoted, providing that in case of the removal of an administrator or executor for refusal to give additional security, the *unadministered* assets or estate may be ordered to be delivered to the administrator d. b. n. appointed in his place.

This act is *in pari materia* with the prior statute of Maryland, and of course is to be interpreted and construed with reference to that and the authoritative judicial interpretations of it.

In fact, we can conceive of nothing else to which we can refer for explanation of the term *administered*, as applied to the assets of a decedent. The legislature is presumed to be acquainted with existing laws and their established interpretation, when in the act of amending them; and when it employs terms used in those laws, the meaning of which has been judicially ascertained, how can one escape the conclusion that they are employed in the sense so ascertained?

It is argued that this interpretation makes the act of 1846 fail of accomplishing its object; that where the safety of an estate in an executor's hands is jeopardized by the death or insolvency of his sureties, it is just as important that *money*, as that *specific property*, should be turned over

by him to an administrator d. b. n., if he fails to give additional security, and therefore it is urged that Congress must have intended this, and must have used the term "unadministered" in a popular instead of a legal and technical sense.

The argument is forcible to show that the act of Congress is defective, and that it ought to have applied to money as well as to specific property, just as the legislation of Maryland in 1820 does, but it does not justify the inference that Congress intended something more than is imported by the language used, which has an ascertained legal signification.

It is also urged that in other cases under the act of Maryland of 1798, in which the letters of a living executor or administrator are revoked, as where a will is discovered and an executor appointed, or a new administrator is appointed because of the failure of an executor or original administrator to return an inventory, or to render an account, he is required to deliver up to his successor all the property, goods, chattels, and personal estate of the deceased; and as this statute is *in pari materia*, and there is the same reason for making its operation equally broad, it ought to be construed as extending to the whole estate.

But, in the first place, it seems to be a gratuitous assumption that the act of 1798, in the cases mentioned, does entitle the new administrator to money collected by his predecessor. It does not in terms; it simply entitles him to all the estate of the deceased. But the theory of the cases we have examined seems to be that when the specific property which belonged to the deceased has been converted into money, the money is the property of the executor or administrator, and is not the estate or property of the deceased, and the executor is simply a debtor to the persons interested in the estate to the extent of that money. It, therefore, may reasonably be maintained that the act of assembly in the cases referred to applies only to specific property. But if it were otherwise, the contrast between the act of Congress and these provisions of the act of 1798 makes it impossible to construe them as embracing the same subject. The act of 1798 requires *all* the property to be turned over; the act of Congress, only that which may remain unadministered to be so turned over. It, therefore, establishes a distinction between administered and

unadministered assets. In the sense of the terms contended for by the plaintiff, to wit, that *administered* means *distributed* and *fully* administered, there could not be assets which are administered, for as soon as they are distributed to legatees or distributees they cease to be assets of the estate at all. It was needless to confine the provision to assets remaining unadministered, for there could be no other assets. It would have sufficed to direct all the property or assets to be turned over. We are bound to hold that the use of the term *unadministered* had an object, and to give the meaning theretofore settled and ascertained.

Now, to apply these reflections to the present case. Mrs. Ames, widow and administratrix of Horatio Ames, deceased, prosecuted a claim owned or represented by said Horatio Ames against the United States, by her attorney, Arrick. Arrick recovered the money, Mrs. Ames giving her receipts in full to the United States, and charging herself in the Orphans' Court with the amount so collected. This was a complete conversion or change of the chose in action or claim which belonged to Horatio Ames when he died. The claim was reduced to possession, converted into cash, collected. It cannot make a shadow of difference that this was done through an agent. Mrs. Ames consummated it by her own act of receipting to and discharging the United States. No subsequent infidelity or default of her agent could make it any less a collection of the claim by her, which made her and her sureties responsible for the money to the creditors and distributees of the deceased. She could not treat this as an unadministered specific thing belonging to the estate of the deceased in the shape of a chose in action against Arrick, and, by turning the chose in action over to the administrator d. b. n., discharge herself and her sureties. If she is chargeable for this money, it is because she has collected it and converted the original chose in action of the deceased into this money.

It was attempted in argument to liken this case to the case put by Salkeld and by Bacon's Abridgment, of money of the testator *laid aside* by the executor as original administrator; but the evidence stated in the bill of exceptions shows no such case. As to the bulk of the money collected, viz., the sum of $33,574.36, the administratrix not only did not lay it aside as the money of the deceased, but virtually paid it away to Arrick for his own use by allowing him to

retain it as his own. It could in no sense, then, be said to be *set aside* as the money of the deceased. Very much the same may be said of the balance of the fund. As far as appears it was collected by the agent of the administratrix, but never paid over to her, and constitutes simply a debt from him to her. She is responsible to the parties in interest for it, but the debt of Arrick is a debt to her. The original chose in action has been converted by her into that. The money itself is not on deposit anywhere to the credit of the estate, or otherwise earmarked. Nothing further appears than that the administratrix has collected this claim, and is generally chargeable with its proceeds in favor of the creditors or distributees, and this makes a case of technical administration. Of course, to administer in this sense is not to administer *fully* in the sense that would sustain a plea of *plene administravit*, but its effect is only to make the administratrix responsible to the parties interested in the estate directly, instead of through the administrator d. b. n.

Without entering into a verbal criticism of the instruction given by the court below, it is sufficient to say that we think it substantially gave the law to the jury as we have declared it. This view renders it unnecessary to consider the other exception, which was to the exclusion of evidence as to the value of Arrick's services.

The new trial is refused.

109-278

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 87.

THE UNITED STATES, TO THE USE OF NATHANIEL WILSON, ADMINISTRATOR *de bonis non, &c.*,

vs.

DAVID WALKER.

BRIEF OF THE DEFENDANT IN ERROR.

W. D. DAVIDGE.

Supreme Court of the United States.

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THE UNITED STATES, TO THE USE OF NATHANIEL WILSON, ADMINISTRATOR *de bonis non*, *&c.*,

vs.

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BRIEF OF THE DEFENDANT IN ERROR.

Statement.

This was an action instituted by an administrator *de bonis non* against the surety in the bond of a removed administrator for an alleged *devastavit*, consisting in the failure of the removed administrator to pay to the administrator *de bonis non* the proceeds of a certain asset which belonged to the decedent, but had been collected by the removed administrator.

I. The declaration presents the anomaly of one count in debt and plea of general performance and replication, averring breaches; and of another count in which the breaches are set out.

Thus, the second count, and the replication to the first

count, culminate in the same issues, except that in the second count no notice of a proceeding in the orphans' court to remove the administrator is averred; whilst in the replication it is averred that of such proceeding the administrator had due notice.

No notice is anywhere averred of any application for the alleged order to pay over to the administrator *de bonis non.*

Both the second count and the replication over that when such order was made the asset in question of the decedent no longer existed in specie, but had been converted into money and wasted.

The defendant claims that the asset having been administered by the removed administrator the defendant is accountable to the beneficiaries of the estate, creditors, legatees, and distributees, and not to the administrator *de bonis non.*

The defendant further claims that even where property is in a legal sense unadministered, an administrator *de bonis non* cannot sue the bond of the removed administrator without obtaining an order of court to that effect; and hence, that the present suit cannot be maintained.

Points and Argument.

I. The title of an administrator *de bonis non* appointed in the place of an executor or administrator deceased or removed, extends only to assets which remain in specie, and does not embrace authority to sue the bond of such executor or administrator for a *devastavit.*

In other words, the deceased, or removed executor or administrator, must account for all assets wasted or converted

directly to the persons beneficially interested, creditors, legatees, and next of kin, and only for assets remaining in specie to the administrator *de bonis non*. Such is believed to be the universal rule, except when by statute the authority of the administrator *de bonis non* has been enlarged.

Beall *vs.* New Mexico, 16 Wall., 535.
Ennis *vs.* Smith, 14 How., 400–416.
De Valengin's Adm'r *vs.* Duffey, 14 Pet., 282.
2 Williams on Ex., 6th Am. Ed., 915, and cases cited in Am. Notes.
Hagthorp *vs.* Hook, 1 G. & T., 270.
Sibley *vs.* Williams, 3 G. & T., 52.
Neale *vs.* Hagthorp, 7 G. & T., 13.
Lemmon *vs.* Hall, 20 Md., 171.
Act of Maryland, 1820, ch. 174, § 3; 1 Dorsey's Laws, p. 738.
Act of Maryland, 1831, ch. 315, § 7; 2 Dorsey's Laws, p. 1060.
Hinkley's Testamentary Law, pp. 295–301.

II. The act of Congress of February 20, 1846, (§§ 974, 975, 976, 977, and 978, Rev. St. D. C.,) applied to the case of a removed executor or administrator the same rule which has existed in relation to a deceased executor or administrator.

It is impossible for language to be clearer. Section 974 provides that if the security is insufficient for any cause, the court may order the executor or administrator to give further security.

Section 975 provides that if the executor or administrator fails or refuses to comply with such order, the court may remove him and appoint a new administrator.

Section 976 then empowers the court to order and require any assets or estate of the decedent which may remain unadministered to be delivered to the newly appointed administrator *de bonis non*, and to enforce a compliance with such order by fine and attachment or any other legal process.

What assets or estate? Why *assets or estate of the decedent which may remain unadministered.* Can language be plainer?

Do not these words expressly declare that the assets or estate are to be *such as belonged to the decedent and remain unadministered?*

Do not these words necessarily point to assets and estate remaining in specie? Are they at all applicable to assets or estate which have been converted into money or wasted, and for the value of which the executor or administrator is liable in damages?

And what is the order to provide in relation to the assets or estate of the decedent which remain unadministered? Why they are to be *delivered* to the newly appointed administrator *de bonis non.* This term "delivered," whilst most apt as referring *to articles capable of delivery*, such as assets remaining in specie, has surely no application where assets have ceased to exist because wasted or converted, and where, in consequence, there is a right of action—a right to sue the bond.

What next? Why obedience to the order to deliver is to be enforced by fine and attachment, or other legal process.

This provision is most appropriate when applied to the refusal of a party to deliver specific articles in his possession, but can it be supposed that the delinquent executor or administrator failing to "deliver" such damages as in the

opinion of the orphan's court had resulted from his delinquencies was to be subject to fine and attachment?

The court will observe, that nowhere is the power given to call the predecessor to account, unless it is to be found in the words "legal process," which requires the order of the court.

So much for the language of the act.

It is submitted that the design of Congress as expressed in the act was to invest the administrator *de bonis non* succeeding a removed executor or administrator with no greater authority than if he had succeeded a deceased executor or administrator. It was not intended that there should be two classes of administrators *de bonis non*, differing in authority according to whether their predecessors were dead or removed.

There was an existing system, and a remedy for an existing evil was found by bringing it within that system. The question is not whether the Congress acted most wisely, but how it acted.

It is impossible, however, to perceive any objection to the law on ground of poliey.

It proceeds upon the theory that where assets have been converted or wasted the better course is to have a settlement directly with the parties in interest—creditors, legatees, and next of kin—instead of a settlement with the administrator, *de bonis non*, and by him with such parties, involving delay and saddling the estate with the costs and expenses of a new administration.

Many States have acted upon this theory.

III. Whatever the authority of the administrator *de bonis non* it is made subject to the directions of the court. *Virtute*

officii, he can bring no suit against the removed executor or administrator. His remedy, if the order requiring delivery is not complied with, is by means of the special jurisdiction lodged in the court. What shall be done is confided to the discretion and judgment of the court and not to the administrator *de bonis non*. It is for the court to determine how it will enforce compliance, whether by fine or sequestration or any other legal process.

The court, having power to resort to any legal process, may order the bond in a proper case to be put in suit. But without the direction of the court the administrator *de bonis non* can do nothing.

In Maryland, the act of 1820, ch. 174, (1 Dorsey's Laws of Md., 738,) allowed the administrator *de bonis non* to sue the former executor or administrator under the direction of the court.

In Johnson *vs.* Farmers' Bank, 11 Md., it was held that the right of the administrator *de bonis non* to maintain an action was derived solely from the act, and that he could not sue without such direction. This case is in point, and disposes of the present.

The intent of the act of Congress goes to place the whole subject as to what should be done in the keeping of the court, and not to allow an administrator *de bonis non* an ablute right to ransack at pleasure all the official acts of his predecessor.

In adopting this policy, Congress conformed to the principle contained in the laws of the different States, in very few, if any, of which, is the absolute power to sue lodged in the administrator *de bonis non*.

IV. The defendant was not estopped by the order to pay to the administrator *de bonis non*, but was entitled to a day in court.

The condition of the bond, it is to be observed, is not to be bound by the order of the court as in many States. The condition is, on the contrary, well and truly to perform the office of administrators, and discharge the duties of them required by law, without injury to any person interested in the faithful performance of the office.

There is here no waiver of a day in court.

Brandt on Sureties, § 71.

1. Accounts settled in the orphans' court are only *prima facie* evidence.

Spedden *vs.* The State, 3 H. & J., 251.
Haslett *vs.* Glenn, 7 H. & J., 23.
Mitchell *vs.* Mitchell, 3 Md. Ch. Dec., 71.
McClellan *vs.* Kennedy, 3 Md. Ch. Dec., 234; S. C., 8 Md., 252.
O'Hara *vs.* Shepherd, 3 Md. Ch. Dec., 306.
Ruby *vs.* State, 55 Md., 490.
Estate of Stratton, 46 Md., 551.
Leighman *vs.* Marshall, 17 Md., 550.
State *vs.* Baker, 8 Md., 44.
Magruder *vs.* Darnall, 6 Gill, 269.
Stockett *vs.* Jones, 10 G. & J., 276.
Scott *vs.* Fox, 14 Md., 388.

In an action against the surety on a testamentary bond, held that the confession of a judgment by an executor is conclusive upon him both as to the debt confessed and the sufficiency of the assets to pay it, but in relation to

his surety on his testamentary bond, it is only *prima facie* evidence on both points.

Iglehart *vs.* The State, 2 G. & J., 235.
Owens *vs.* Collinson, 3 G. & J., 25.
Gaither *vs.* Welch, 3 G. & J., 259.
Kearney *vs.* Sascer, 37 Md., 264.

In the note to report of the case of Heard *vs.* Lodge, 20 Pick., 53, in Am. Dec., 202, &c., will be found many of the cases for and against the Maryland doctrine.

In Heard *vs.* Lodge the duty assumed by the sureties was not as here, but as stated by the court (32 Am. Dec., 199), "that their principal would pay on demand all debts ascertained by judgment of a court of law against him in his capacity of administrator, if the estate be solvent."

In this District and Maryland it has never been held that a bond conditioned as here meant that the principal should obey the orders of the court, but merely that he should faithfully discharge the duties of his office; and hence a surety in a testamentary bond is no more bound by judgment against the principal than any other manner of surety.

See also—

Hobbs *vs.* Middleton, 1 J. J. Marsh, 184.
Armstead *vs* Harramon, 4 Hawks, 341.
Seat *vs.* Cannon, 1 Humph., 470.
Ordinary *vs.* Wallace, 1 Rich., 507.
Lowell *vs.* Parker, 10 Metc., 315.
Pritchard *vs.* Farrar, 116 Mass., 213.
Robinson *vs.* Hodge, 117 Mass., 224.

2. The court had no jurisdiction to make the order.

The postulate of jurisdiction, that is, unadministered

assets, did not exist. This is conceded by the second count, and also by the replication.

The court did not find the fact of unministered assets, and order them to be turned over to the administrator *de bonis non*, but the court did find the fact of administered assets, and ordered them to be turned over. There never was any controversy over the fact of conversion, and that fact made the assets administered assets.

It is idle to attempt to infer the fact from the order of the court when all agree as to what the fact was.

> Windsor *vs.* McVeigh, 93 U. S., 274, and cases cited in opinion of Judge Cox.

But further, it is the *fact* as found which estops, and not the law as applied to such fact.

As stated by Lord Ellenborough, in Outram *vs.* Moorehead, 3 East., 346, and quoted in the decision of this court in Cromwell *vs.* County of Sac, 94 U. S., 353: "It is not the recovery, but the matter alleged, and upon which the recovery proceeds which creates the estoppel."

> And see, Cromwell *vs.* County of Sac., 94 U. S., 353. Sickles *vs.* Steampacket Co., 24. How., 333; S. C. 5 Wall. 580.

The estoppel is not pleaded. The order relied on is that of a court of limited jurisdiction. Jurisdiction is not alleged, nor the notice required by § 978, nor the fact of unadministered assets.

Respectfully submitted.

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